Supreme Court of the United States

OCTOBER TERM, 1948.

No. 401 .

CITY BANK FARMERS TRUST COMPANY, as ancillary executor of the last will and testament of Edwin Prestage, deceased, and as trustee under an agreement made by said deceased dated July 31, 1939,

Petitioner,

v.

WILLIAM J. PEDRICK, United States Collector of Internal Revenue for the Second District of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

CHARLES ANGULO,
Attorney for Petitioner,
20 Exchange Place,
New York City.

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Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit and Supporting Brief.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner above named prays that a writ of certiorari issue to review the judgment [R. 96] of the United States Court of Appeals for the Second Circuit entered in this cause on the 27th day of May, 1948. A petition for a rehearing was timely filed in the Court of Appeals on June 9, 1948, pursuant to Rule XXVIII of said Court, and denied on August 13, 1948 [R. 98-105, 107].

STATEMENT OF MATTER INVOLVED AND QUESTION PRESENTED.

This case relates to the Federal Estate Tax. It is an action to recover an overpayment of such tax of approximately $8,500. The statute exempts from the

tax bank deposits maintained in this country by or for the benefit of non-resident aliens who are not engaged in business here at the time of their death. The case involves the question of whether the exemption is applicable to bank deposits that are held by trustees for the benefit of such aliens, under *inter vivos* trusts which they created and which are includible in their statutory estate for purposes of the tax. The decision below in effect limits the exemption to bank deposits in the alien's probate estate.

In 1921 (when the exemption here in question was originally enacted) this country was in a serious business depression. Bank lending rates were very high.[1] London was at the time the magnet for short-term liquid capital from most of the world. By inducing foreigners to send such funds to banks in this country, the volume of bank credit available for loans to American industry, commerce and agriculture would be increased, and this in turn would tend to lower the cost of borrowing and thus help to stimulate business activity. Accordingly, bank deposits in this country were exempted from federal estate tax in the case of foreigners residing abroad who were not engaged in business in the United States and who, therefore, ordinarily would have no need for sending their money over here.[2]

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1 In June, 1921, the interest rate customarily charged on customers' loans by banks in our principal cities was 6.81%; the rate in June of the current year was 2.56% (Banking and Monetary Statistics [Federal Reserve] Table 124, p. 463; Federal Reserve Bulletin, September, 1948, p. 1145).

2 It was stated in the Senate Committee Report that the exemption was designed to help domestic banks compete with foreign banks. Since the exemption also extends to bank deposits maintained by foreigners with foreign banks *in this country*, it is evident that the competitive assistance referred to was directed to bank deposits maintained by foreigners in foreign banks, *abroad*. The primary purpose was to attract to banks in this country, money held by foreigners abroad, thereby making it available to such banks for loans to their customers (Senate Report No. 275, 67th Congress, First Session, relating to Internal Revenue Bill of 1921 [Cum. Bul. 1939-1, Part 2, p. 199]).

The statutory provisions involved have remained unchanged since they were first adopted in 1921 and are now found in Section 863 of the Internal Revenue Code, reading as follows:

> "SEC. 863. PROPERTY WITHOUT THE UNITED STATES.
>
> The following items shall not, for the purpose of this subchapter, be deemed property within the United States:
>
> (a) * * * [not relevant.]
>
> (b) *Bank Deposits.* Any moneys deposited with any person carrying on the banking business, by or for a non-resident not a citizen of the United States who was not engaged in business in the United States at the time of his death."

The intent of the Section is simply and clearly stated in the "Instructions" issued by the Treasury Department which appear on the printed form of Estate Tax Return it furnishes to taxpayers (Form 706). In so far as material, they are as follows (reverse side of Sheet XX):

> "*Additional Instructions for Estates of Nonresidents Not Citizens of the United States*
>
> * * * *
>
> Except as hereinafter provided, the following rules are applicable in determining whether property is situated in the United States:
>
> * * * *
>
> However, pursuant to treaty or statute, the following classes of property are regarded as *not* situated in the United States:
>
> * * * *

> (2) In the case of a nonresident not a citizen of the United States who was not engaged in business in the United States at the time of his death, (a) bank deposits and (b) bonds, notes, and certificates of indebtedness of the United States * * *."

That the foregoing administrative construction of the statute is correct, is shown in the annexed brief.

The facts in the case are not in dispute and practically all of them have been stipulated [R. 37]. The decedent was a British subject, residing in England and not engaged in business in the United States at the time of his death [R. 38]. Prior to July 31, 1939, he maintained a bank deposit in this country of approximately $80,000 with The National City Bank of New York [R. 38]. On that date, in order to protect his bank deposit in case of a European war, he transfered it to a trustee in this country, to hold in trust for his benefit, and after his death for the benefit of his widow [R. 11, 38]. The trust agreement required the trustee to retain the property as a bank deposit unless the decedent otherwise directed, which he did not do.[3] The decedent also reserved the right to revoke the trust with the consent of the trustee, and there were provisions in the trust agreement the effect of which was to require the trustee to consent to such revocation, whenever it was for the decedent's benefit [R. 16, f. 47].

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3 Article 2 of the trust agreement provides in part as follows:

"During the Settlor's life, except in the event of his disability, such powers shall be exercised by the Trustee *in such manner only as the Settlor shall from time to time direct* by an instrument in writing delivered to the Trustee and *unless otherwise directed by the Settlor* in writing as aforesaid, *the Trustee shall retain the property* (including, but not by way of limitation, cash) from time to time held by it hereunder" [R. 13, 14]. (Italics supplied.)

Upon the creation of the trust, the said bank deposit was transferred from The National City Bank of New York to the banking department of City Bank Farmers Trust Company (the trustee), but *both* the lower courts agreed that this did not affect its character as a "bank deposit", which continued until the decedent's death [R. 79, f. 237, p. (lower half) 93].

However, the Court of Appeals (reversing the District Court) held that the exemption is limited to bank deposits of which the decedent himself is the owner at the time of his death, and does not apply to a bank deposit held for his benefit by his trustee under a trust that is includible in his statutory estate for purposes of the tax. In effect, therefore, according to the decision below the said exemption applies exclusively to bank deposits which are part of the decedent's *probate* estate and does not apply to those which are only part of his *statutory* estate for purposes of the tax.[3a]

Such a differentiation is clearly contrary to the *scheme* of the federal estate tax statute, *as a whole.* That much is plain. *But in the present instance there would be no reason for Congress to depart from the statutory scheme; because as long as the foreigner's money was in a bank deposit with an American bank over here, it was equally available to such bank for loans to American business, irrespective of whether technically, the legal title to the bank deposit was in the foreigner himself, or in his trustee for his benefit.*

So far as we can find, the differentiation made below is without precedent in the death tax legislation of this or any other country. It leads to an absurd

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3a The Court left open the question of whether there would be an exception to the above in the case of a decedent who had an absolute right to revoke the trust and thus was for all practical purposes the owner of the trust property, but it indicated a doubt as to whether even such an exception existed [R. 94].

result. For it imposes a *greater* tax in respect of property of which the decedent is merely *deemed* to be the owner, than would be imposed if he were *in fact* the owner of the property. Such, surely, was not the intention of Congress.[4]

Moreover, by Section 4 of the Victory Liberty Loan Act (40 Stat. 1309), an analogous exemption from federal estate tax was conferred in 1919, in respect of United States government bonds "beneficially owned" by a non-resident alien who was not engaged in business in the United States.[5] More than twenty years ago it was judicially declared that the said exemption applies to United States bonds held in a trust like the present (*Farmers' L. & T. Co.* v. *Bowers*, 22 F. (2d) 464). The Treasury Department has acquiesced

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4 The trust involved in *Helvering* v. *City Bank Farmers Trust Co.*, 296 U. S. 85, was substantially identical with the instant trust. This Court held that the statutory provisions subjecting to estate tax the property in such a trust, were designed to place such property in an "equivalent" status for tax purposes with property which the decedent actually owned at his death. The Court said at page 90:

> "The inquiry is whether it is arbitrary and unreasonable to prescribe for the future that, as respects the estate tax, a transfer, complete when made, shall be deemed complete only at the transferor's death, if he reserves power to revoke or alter exercisable jointly with another.
>
> * * * Congress may adopt a measure reasonably calculated to prevent avoidance of a tax. * * * A legislative declaration that a status of the taxpayer's creation shall, in the application of the tax, be deemed the *equivalent* of another status falling normally within the scope of the taxing power, *if reasonably requisite to prevent evasion*, does not take property without due process." (Italics supplied.) (See also, *Helvering* v. *Bullard*, 303 U. S. 297.)

5 This exemption had a similar objective as the exemption later conferred on "bank deposits". In the debate in the House of Representatives on Section 4 of the Victory Liberty Loan Act, the following colloquy occurred:

> "Mr. Moore of Pensylvania—Let us see if we clearly understand the purpose of this section. It is intended to encourage the purchase by aliens of American securities, and to that extent it would relieve the pressure upon the American security field.
>
> Mr. Kitchin—That is true.
>
> Mr. Moore of Pennsylvania—Whereas it is contended that the bonds are selling below par in the United States, and if we can find a foreign market for those bonds we induce the foreigner to buy the bonds, with the understanding that so far as his holdings are concerned, they are tax free (57 Cong. Rec. 4294, [1919])."

in that decision since it was rendered in 1927; and in the above quoted "Instructions" it puts "bank deposits" on the same footing with United States bonds, for the purposes of the said exemptions.[6]

The court below reached the incongruous result pointed out above, by applying the rule of strict construction which generally governs tax exemption statutes. But although, at first glance, the said section may appear to be a tax exemption statute, a closer examination reveals that such is not its true nature. *For here the statutory provisions in question were primarily addressed to persons and property that were at the time beyond the reach of the taxing jurisdiction of the United States.* Obviously, money kept on deposit in a foreign bank abroad by a non-resident alien not engaged in business in the United States, is *immune* from taxation in this country. *In effect, therefore, the instant statute merely promised to continue a pre-existing tax immunity that was not dependent upon the grace of the sovereign.* In this respect the said statute differs materially from a "tax exemption" statute as commonly understood.

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6 The reason the tax was initially assessed in the present case was because the money in question was on deposit with the Trust Company itself and not in another bank. It was thus erroneously concluded by the Revenue Agent that the *currency* itself was held by the Trust Company in its capacity *as trustee* (in which case it obviously would not constitute a "bank deposit") and that the case was, therefore, governed by an opinion rendered in 1940 by the Chief Counsel of the Bureau of Internal Revenue (G. C. M. 22419, C. B. 1941-2, p. 288). The District Court remarked in its opinion [R. 73, f. 217] that if the money had been deposited by the trustee institution in another bank, the Bureau probably would not even have claimed that it was subject to tax. On the trial it was shown that the money in question was on deposit pursuant to Section 100-b of the Banking Law of the State of New York, with the banking department of City Bank Farmers Trust Company in a "bank deposit" in the name of "City Bank Farmers Trust Company, Trustee, Edwin Prestage u/a 7/31/39 with Edwin Prestage", and that under New York law such a deposit was precisely the same as if the money had been deposited in another bank. (*Matter of Howell*, 237 App. Div. 56.) [R. 39, 77] On the appeal the government abandoned the ground on which the tax was initially assessed, and fell back upon the alternative contention which it had made in the District Court, viz., that the said exemption does not apply to *any* "bank deposit" held in *any* trust.

Moreover, the rule of construction applied below is not to be pushed to the point of unreasonableness (26 R. C. L. 314). It is subordinate to the paramount rule that the purpose and intent of the legislature as ascertained from the *whole* statute, must be given effect. In *Trotter* v. *Tennessee,* 290 U. S. 354, 356, the late Justice Cardozo, speaking for this Court, stated the rule as follows:

> "Exemptions from taxation are not to be enlarged by implication if doubts are nicely balanced. On the other hand, they are not to be read so grudgingly as to thwart the purpose of the lawmakers."

As we have seen, the rule as applied below leads to an unreasonable result, and thwarts the underlying legislative purpose of according equal treatment to property owned by the decedent and property which is regarded as being owned by him for purposes of the tax.

Finally, as indicated above, the statute in question was in substance a promise made to foreigners by our government in order to induce them to send their money over here. Surely, they were reasonably entitled to construe our promise as our Treasury Department itself has done in its said "Instructions". They had no reason to suppose that without calling attention or even alluding to it, Congress would take such a revolutionary step in the field of death taxation as to impose a greater tax on property which is only *fictionally* regarded as belonging to the deceased for tax purposes, than would be imposed if his ownership were real and actual. As a matter of simple fairness, our promise should be performed as reasonably understood by those to whom it was addressed and whose conduct it was designed to influence.

In the case of treaties, we have long construed our international engagements in a broad and liberal spirit (5 *Hackworth, Dig. of Int. Law,* 255, 256), and it is not in our tradition to differentiate in this respect between our promises to foreign governments and our promises to their peoples.

Specification of Errors.

The Court of Appeals erred:

1. In holding that the bank deposit which on the date of the decedent's death formed part of the trust which he created by the agreement dated July 31, 1939, constituted property situated within the United States for purposes of the federal estate tax.

2. In holding that the said bank deposit was includible in the decedent's gross taxable estate for federal estate tax purposes.

3. In holding that the rule of situs laid down by Section 863(b) of the Internal Revenue Code applies only to bank deposits of which the decedent was the actual owner at the time of his death and which thus are part of his probate estate, and does not apply to bank deposits held in trust for his benefit of which he is deemed to be the owner for purposes of the tax.

Reasons for Granting the Writ.

1. The question involved is an important one in the administration of the Internal Revenue laws which should be decided by this Court, because both before and during the war many non-resident aliens who were not engaged in business over here, transferred their bank deposits in this country to trustees

so as to protect them from confiscation if their country was invaded. A large number of such aliens must have since died either in concentration camps or as a result of bombings or from natural causes, so that the said question arises in their estates.

2. The decision of the Court of Appeals would appear to be in conflict with the decision of this Court in *Helvering* v. *City Bank Farmers Trust Company*, 296 U. S. 85, in which it was held that the statutory provisions subjecting to estate tax property in an *inter vivos* trust like the one in the case at bar, were designed to place such property in the same position for tax purposes as property which the decedent actually owned at his death.

3. Lastly, the narrow and "isolationist" construction given to the statute by the lower court puts our government in the position before the rest of the world of reneging on its promise of tax immunity as reasonably understood by those to whom it was addressed and whose conduct it was designed to influence. There are special and important reasons why this Court should decide a question of this international nature in these troubled times when so much depends on our having the full confidence of other nations and their peoples.

WHEREFORE, it is respectfully submitted that this petition should be granted.

Dated, November 5th, 1948.

Respectfully submitted,

CHARLES ANGULO,
Attorney for Petitioner.

BRIEF IN SUPPORT OF THE PETITION.

Opinion Below.

The opinion of the Court of Appeals is reported in 168 F. (2d) 618 [R. 91]; the District Court's opinion is reported in 69 F. Supp. 517 [R. 69].

Jurisdiction.

The jurisdiction of this Court to issue the writ rests on Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. The judgment of the Court of Appeals was entered on May 27, 1948 [R. 96]. A petition for rehearing was timely filed on June 9, 1948 [R. 98-105] pursuant to Rule XXVIII of the said Court of Appeals; and said petition was denied on August 13, 1948 [R. 107].

Statement.

A statement of the facts and of the questions presented and of the assigned errors will be found in the petition.

Statute Involved.

The statute involved is Section 863(b) of the Internal Revenue Code which is printed on page 3 of the petition.

Argument.

The administrative construction of Section 863(b) contained in the Treasury Instructions is correct.

In the annexed petition, we have quoted (pp. 3, 4) the relevant Instructions issued by the Treasury Department governing the preparation of Federal Estate Tax Returns in estates of non-resident alien decedents. Those Instructions (which have practically the same standing as Treasury Regulations) construe Section 863(b) to mean that in the case of an estate of a non-resident alien who was not engaged in business in the United States at the time of his death, bank deposits are regarded as *not* having a situs in this country. The rule as stated by the Treasury is absolute and contains no hint or suggestion of the distinction made below between bank deposits that were owned by the decedent himself and thus are part of his probate estate, and those that are deemed to have been owned by him and thus form part of his statutory estate for purposes of the tax.

The above administrative interpretation of Section 863(b) is the practical, "common sense" construction of the man in the street. We propose here to show that it is also the correct legal construction.

It is apparent that the general scheme of the federal estate tax statute viewed as a whole, is to accord equal treatment to property of which the decedent is actually the owner at the time of his death, and property of which he is deemed to be the owner at that time for purposes of the tax. This is basic; and it is also patently reasonable. It must follow, therefore, that wherever possible, particular provisions of the stat-

ute are to be construed so as to conform to that basic statutory scheme.

As we have shown in the annexed petition Section 863(b) was designed to attract to banks in this country money held by foreigners abroad, thereby making it available to American banks for loans to American business. Now, so long as such money remains as a bank deposit in an American bank over here, it is equally available to the depositary bank for loans to American business, irrespective of whether technically the legal title to the bank deposit is vested in the foreigner himself, or in his trustee for his benefit. Thus there would be no reason for Congress to depart from the basic statutory scheme in enacting Section 863(b).

Moreover, Section 863(b) purports on its face to lay down the governing rule for fixing the situs of bank deposits in estates of non-resident aliens not engaged in business in the United States at the time of death, and logically one would expect the same rule of situs to apply to all taxable occasions within the purview of the statute.

By its terms Section 863(b) deals with two situations. On the one hand it refers to "moneys deposited *by*" the decedent; on the other hand, it also refers to "moneys deposited *for*" the decedent. Now, money deposited in the bank account of the decedent during his life, whether deposited by the decedent himself or by someone else on his instructions or otherwise by his authority, constitutes from a legal standpoint "moneys deposited *by*" the decedent. Therefore, some additional meaning must be attributed to the other expression "moneys deposited *for*" the decedent,—unless we are to disregard the word "for" as mere surplusage

which, of course, would be contrary to a fundamental rule of statutory construction.

The word "for" is frequently used as meaning "for the benefit of". That is a phrase of wide scope. There would be no warrant in law or usage for confining its meaning to an *agency* relationship exclusively, that is to say, to a bank deposit which is held for the benefit of the decedent, by his *agent*. A *trustee* also holds property for the benefit of others. Thus, for example, in *Brown* v. *Fletcher*, 235 U. S. 589, this Court said, at page 598:

> "In either case, and whatever its form, the trust property was held by the trustee,—not in opposition to the *cestui que trust* so as to give him a chose in action, but,—in possession *for his benefit* in accordance with the terms of the testator's will." (Italics supplied.)

Therefore, under accepted legal terminology a bank deposit is held *for the benefit of* the decedent where it is held in a trust of which he is beneficiary.

Thus Section 863(b) applies alike, irrespective of whether the rights and interests of the decedent in the bank deposit are from a technical standpoint, legal or equitable in nature; in either case they are regarded as not having a situs in the United States for purposes of the tax.

So construed, Section 863(b) conforms to the basic scheme of the federal tax statute as a whole; and, furthermore, we thereby avoid imputing to Congress the unreasonable intention of imposing, in respect of property of which the decedent is merely deemed to be the owner, a greater tax than would be imposed if he were in fact the owner of the property.

The court below seems to have misapprehended the question involved.

At the end of its opinion the Court of Appeals said [R. 95]:

> "A deposit so hedged about with restrictions [*i. e.*, the provisions whereby the deposit could only be withdrawn *from the trust* with the trustee's consent] is not properly a bank deposit at all; at least there is no reason to suppose that it is within the scope of §863(b)."

We did *not* contend, of course, that the relationship between the *trustee* and the *cestui que trust* was a "banker-depositor" relationship resulting in a "bank deposit". The "banker-depositor" relationship was between the banking department of the Trust Company (that is to say, the Trust Company in its *individual* capacity) on the one hand, and the Trust Company in its capacity *as trustee* on the other. (Under New York law such relationship was the same as if the trustee institution maintained the deposit with a different bank. *Matter of Howell*, 237 App. Div. 56.) Thus the "bank deposit" in question was merely one of the items of property constituting the trust *res* in the hands of the trustee. *That* "bank deposit" was *not* in any sense "hedged about with restrictions", as between the depositor and the depositary bank. In other words, it was subject to withdrawal at any time on the depositor's order like any other bank deposit.

Presumably what the Court meant in the above quoted passage was that the "restrictions" on the decedent's right to revoke the trust prevented his being regarded as the *owner* of the bank deposit. However, as we have seen, the statute not only exempts bank

deposits of which the deceased was the owner, but also bank deposits that are held *for his benefit.*

The "restrictions" referred to in the Court's opinion do not negative or contradict that in the present case the trust *res* (including the said "bank deposit") was being held *for the benefit* of the decedent. Indeed, the said "restrictions" were inserted in the trust deed *for the benefit* of the decedent. For the trustee in determining whether or not to give its consent to a proposed revocation by the decedent was bound to consider only the decedent's interest, that is to say, whether it was *for his benefit* [R. 16].

Respectfully submitted,

CHARLES ANGULO,
Attorney for Petitioner.

November 5th, 1948.

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REPLY BRIEF OF PETITIONER.

CHARLES ANGULO,
Attorney for Petitioner,
20 Exchange Place,
New York City.

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REPLY BRIEF OF PETITIONER.

1. The government says (p. 8) that Section 863(b) "contemplates a direct debtor-creditor relationship between the bank and the alien". But that view was refuted by the Tax Court in *Estate of Karl Weiss,* 6 T. C. 227, 229 (acquiesced in by the Commissioner, C. B. 1946-2, p. 5), as follows:

> "Congress did not describe the deposit as one in the name of the decedent or one made directly by him, *nor did it mention a direct contractual relationship between him and the bank.*" (Italics ours.)

As shown in our supporting brief, Section 863(b) applies not only to bank deposits of the decedent, but also to those that are *for his benefit.*

2. The government states in its brief (p. 5):

> "The instant case presents only the question whether *the decedent's interest in the trust* should have been excluded from his estate under Section 863(b) of the Internal Revenue Code by reason of the fact that the corpus consisted of a bank deposit." (Italics ours.)

But the tax is *not* imposed in respect of "the decedent's interest in the trust"; it is imposed in respect of the *whole* trust corpus. The trust is disregarded for purposes of the tax and the specific items of property constituting the corpus are *deemed* to be owned by the deceased.

Included among those items of property in the instant case, there was concededly a *bank deposit.* For the purposes of the tax, *that* bank deposit is treated as if it were owned by the decedent at the time of his death. Now the only reason for so treating it, is in order to subject it to the same tax that would be imposed if the trust in question had not been created. *Helvering* v. *City Bank Co.,* 296 U. S. 85. But if the trust in question had not been created, the bank deposit concededly would be free from tax.

The decision below subjects to the tax property the ownership of which is *fictionally* attributed to the decedent by the statute merely to prevent the avoidance of the tax that would be payable if his ownership were real,—notwithstanding that such property would be free from tax if the decedent had not transferred it but had remained the actual owner thereof at the time of his death. Such result speaks for itself.

And yet, it is the supposed justification for our failing to perform our promise of tax immunity in accordance with the natural expectations of those to whom it was addressed and whose conduct it was designed to influence. The decision below thus lends itself to hostile propaganda against our government abroad, where it naturally will be viewed as reflecting on the sense of fairness of our government, and even its sincerity, in dealing with foreign peoples. In this critical period of our foreign relations (involving our moral leadership of foreign nations and their peoples) it is in the public interest, we submit, that a question of this international nature be reviewed and decided by this Court.

3. It is, of course, true, as the government asserts, that *Helvering* v. *City Bank Co.*, 296 U. S. 85, did not involve Section 863(b). But it did involve provisions similar to those under which the trust here in question has been subjected to tax (Internal Revenue Code Section 811(d), formerly Section 302(d) of the Revenue Act of 1926). In the *City Bank Co.* case this Court passed upon the scope and purpose of such provisions, and it held, in effect, that they were designed to put property that was held in a trust like the present, in the same position for tax purposes as if such property were owned by the deceased at the time of his death. This Court said at page 90:

> "Congress may adopt a measure reasonably calculated to prevent avoidance of a tax. The test of validity in respect of due process of law is whether the means adopted are appropriate to the end. A legislative declaration that a status of the taxpayer's creation shall, in the application of the tax, be deemed the equivalent of another

> status falling normally within the scope of the taxing power, if reasonably requisite to prevent evasion, does not take property without due process. But if the means are unnecessary or inappropriate to the proposed end, are unreasonably harsh or oppressive, when viewed in the light of the expected benefit, or arbitrarily ignore recognized rights to enjoy or to convey individual property, the guarantee of due process is infringed."

This Court further said at page 92:

> "There are however limits to the power of Congress to create a fictitious status under the guise of supposed necessity."

Obviously, the taxing of the bank deposit in the instant case is not "reasonably requisite to prevent evasion", *because there was no tax to evade.*

4. The exemption from federal estate tax involved in *Farmers' Loan and Trust Co.* v. *Bowers,* 22 F. (2d) 464, was conferred in respect of United States government bonds "beneficially owned" by a nonresident alien who is not engaged in business in the United States. The trust in the *Farmers' Loan and Trust Co.* case was practically the same as ours. It was held that the bonds were "beneficially owned" by the deceased and thus exempt from the tax. The government has acquiesced in that decision for over twenty years. Accordingly, it cannot fairly dispute that the bank deposit in the instant case was "beneficially owned" by the deceased. But, as pointed out in our main brief (pp. 12-14), Section 863(b) of the Internal Revenue Code applies to bank deposits that

are held *for the benefit* of the decedent, and we submit that, if anything, the scope of such a provision is even broader than the expression "beneficially owned".

5. It is hardly accurate for the government to say (p. 7) that the decision below "turns on the peculiar facts presented". The differentiation made below between a bank deposit of which the decedent was the actual owner (and which thus is included in his probate estate) and one of which he is merely deemed to be the owner for purposes of the tax (and is thus includible in the statutory estate for tax purposes), is a rule of general application. The decision does not turn on any "peculiar facts".

Respectfully submitted,

CHARLES ANGULO,
Attorney for Petitioner.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 69-80) is reported in 69 F. Supp. 517. The opinion of the Court of Appeals (R. 91-95) is reported in 168 F. 2d 618.

JURISDICTION

The judgment of the Court of Appeals was entered on May 27, 1948. (R. 96-97.) The petition for rehearing (R. 98-105) was denied on August 13, 1948 (R. 106-108). A petition for a writ of certiorari was filed November 8, 1948. The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Sec. 1254.

QUESTION PRESENTED

Whether a bank deposit of $80,377.02 was properly included within the estate of a deceased nonresident alien for purposes of the federal estate tax, or whether it should have been excluded under Section 863(b) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set out in the Appendix, *infra,* pp. 10-12.

STATEMENT

This is an action for the recovery of estate taxes paid. (R. 2-32.) The facts were largely stipulated. (R. 37-43, 70.) The District Court made special findings of fact (R. 70-71) and concluded that the taxpayer was entitled to judgment (R. 80). Judgment was accordingly entered for the taxpayer in the principal amount of $8,499.46 plus interest and costs. (R. 84-85) The Collector appealed to the Court of Appeals for the Second Circuit which reversed the judgment and dismissed the complaint.

(R. 95, 96-97) The taxpayer's petition for rehearing was denied. (R. 98-108)

The findings of the District Court (R. 70-71, 73), supplemented by the stipulation (R. 37-43), may be summarized as follows:

Edwin Prestage (hereinafter called the decedent) died October 11, 1940, a British subject, residing and domiciled in England. He was not engaged in business in the United States. (R. 70.)

His will, dated March 21, 1938, was duly probated on April 17, 1941, in England, and was thereafter recorded in the Surrogate's Court, New York County, and ancillary letters testamentary were duly issued by that court to the taxpayer, which duly qualified thereunder and has ever since continued as ancillary executor. (R. 70.)

The bank account here involved had been maintained in his own name by the decedent in National City Bank of New York prior to July 31, 1939. On that day he created an *inter-vivos* trust, naming and designating the taxpayer as sole trustee. (R. 70.)

By the deed of trust, the decedent conveyed to taxpayer as sole trustee some securities and $79,000 then on deposit in his account in the National City Bank of New York. (R. 19, 70.) This deed provided that the trustee should collect the income from the property and apply it to the use of the decedent during his life, and after his death to that of his wife; and upon the death of both the trustee

was to transfer the principal as the survivor might appoint by will, with remainders over in default of appointment. (R. 11-12, 70-71, 73.) The trust deed gave the trustee various rights in the management of the trust fund (subject to the supervision of the settlor) (R. 12-14, 70-73); and in Article Fifth (R. 15-16) the settlor reserved to himself—

> the right at any time and from time to time, with the consent in writing of the Trustee (but not otherwise) * * * to amend or revoke this instrument or the trusts hereby created, either in whole or in part.

In the event of any such revocation the principal was to be transferred back to the settlor. (R. 16.) After his death a similar power was reserved to his wife, and then the deed went on as follows (R. 16):

> In giving or withholding its consent to any such amendment, revocation or termination, the Trustee shall consider only the interests of the Settlor or his said wife who is making such amendment, revocation or termination, as the case may be, and not those of any other person interested in the trust hereby created, except that in its own individual interests the Trustee may withhold its consent to any proposed amendment which in its judgment would substantially increase its duties or responsibilities.

Upon receipt by the trustee of the sum of $79,000 referred to above, the trustee deposited it with

itself individually, in an account designated "City Bank Farmers Trust Company, Trustee Edwin Prestage u/a 7/31/39 with Edwin Prestage—No. 20050," and that sum remained so deposited continuously until and including the date of the death of the decedent. (R. 70-71.)

Between July 31, 1939, and the date of death, items of income from the securities, totaling $1,377.02, were likewise so deposited. (R. 71.)

The Commissioner included the bank deposit in the decedent's gross estate for purposes of the federal estate tax. (R. 41.) The taxpayer paid the tax (R. 41) and thereafter filed a claim for refund which was disallowed (R. 42). Thereafter the taxpayer brought this action. (R. 2-32.)

ARGUMENT

The instant case presents only the question whether the decedent's interest in the trust should have been excluded from his estate under Section 863(b) of the Internal Revenue Code (Appendix, *infra*) by reason of the fact that the corpus consisted of a bank deposit. Section 863(b) provides for the exclusion from the estate of a nonresident alien who was not engaged in business in the United States at the time of his death, of any moneys deposited by or for such alien with any person carrying on the banking business. In substance, the court below held that since the decedent's rights ran against the trustee and since the bank deposit was not *his* at the date of his death,

the exemption provision of Section 863(b) was inapplicable.

This provision first came into the law in Section 403(b)(3) of the Revenue Act of 1921 and it has since been continued without any material change. See Revenue Act of 1924, Sec. 303(e); Revenue Act of 1926, Sec. 303(e); Revenue Act of 1934, Sec. 403(d); Internal Revenue Code, Sec. 863(b), *supra*.

The provision has long been coupled with similar provisions with respect to proceeds of life insurance, and both were enacted in 1921 with the view of attracting foreign capital. See S. Rep. No. 275, 67th Cong., 1st Sess., p. 25 (1939-1 Cum. Bull. (Part 2) 181, 199).[1]

The Court of Appeals was not unmindful of the purpose of the enactment but it took the view (R. 93-94), correctly, we submit, that the section is a

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[1] This report states:

> Section 403(b)3: Under existing law the proceeds of insurance upon the life of a nonresident decedent, where the insurer is a domestic company, is deemed property within the United States. This has been found to place American insurance companies at a disadvantage in competing with foreign companies, and, in order to remedy this situation, the proposed bill expressly states that such insurance shall not be regarded as property situated in the United States. A like provision is made respecting moneys deposited with any person carrying on a banking business, by or for a nonresident decedent who is not engaged in business in the United States at the time of his death.

tax exemption to be strictly construed and so construed it is doubtful whether the deposit would have been excludible even if the settlor had reserved an unconditional power to withdraw it from the trust whenever he chose. However, the Court of Appeals found it unnecessary to decide that question, for here there was no unconditional power; the decedent could not revoke without the trustee's consent and the trustee was under a fiduciary duty to consider whether such a revocation would be in the settlor's interests. And the Court of Appeals concluded (R. 95)—

> A deposit so hedged about with restrictions is not properly a bank deposit at all; at least there is no reason to suppose that it is within the scope of Section 863(b).

The decision of the Court of Appeals is believed to be sound and it turns on the peculiar facts presented.

In its petition for certiorari (p. 10) the taxpayer contends that the instant decision is in conflict with *Helvering* v. *City Bank Co.*, 296 U. S. 85, but plainly there is no such conflict. The *City Bank* case did not deal with the estate of a nonresident alien, did not touch the instant problem at all, and does not hold or indicate that a bank deposit such as here involved would be excludible under Section 863(b).

The taxpayer says (Pet. 3-4, 6-7, 12) that the "Instructions" issued by the Treasury Department

which appear on the Estate Tax Return (Form 706) are at variance with our position here. We see no such variance and think that the argument of taxpayer simply begs the question whether a bank deposit like the instant one is within the scope of Section 863(b) in the circumstances of this case. The case of *Farmers' Loan & Trust Co.* v. *Bowers,* 22 F. 2d 464 (S. D. N. Y.), cited by taxpayer (Pet. 6), turns on the peculiar statutory provisions with respect to liberty bonds, and the decision there is not in point here. And see Mim. 5202, 1941-2 Cum. Bull. 241.

Taxpayer cites (Pet. 14) *Brown* v. *Fletcher,* 235 U. S. 589, as authority for the proposition that a trustee holds the trust property for the benefit of the *cestui,* and of course there is no dispute as to this. But it certainly does not follow that the instant deposit is excludible under Section 863(b), for that section *contemplates a direct debtor-creditor relationship between the bank and the alien.* See G. C. M. 22419, 1940-2 Cum. Bull. 288. Here there was no such direct relationship, and as held by the Court of Appeals, a "deposit so hedged about with restrictions is not properly a bank deposit at all." (R. 95.) Taxpayer says (Pet. 15) that the bank deposit was not hedged about by restrictions as between the trustee and the bank. But even if that be so, it would not help taxpayer for it is the relationship between the decedent and the bank that is critical, and here that relationship was too remote to justify the exemption.

CONCLUSION

The decision of the Court of Appeals upon the peculiar facts of this case is correct; there is no conflict; and the petition should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,

L. W. POST,
Special Assistants to the Attorney General.

November, 1948.

APPENDIX

Internal Revenue Code:

PART III—ESTATES OF NONRESIDENTS NOT CITIZENS OF THE UNITED STATES

SEC. 860. RATE OF TAX.

A tax equal to the sum of the percentages set forth in section 810 of the value of the net estate (determined as provided in section 861) shall be imposed upon the transfer of the net estate of every decedent nonresident not a citizen of the United States dying after the date of the enactment of this title.

(26 U. S. C. 860.)

SEC. 861. NET ESTATE.

(a) *Deductions Allowed.*—For the purpose of the tax the value of the net estate shall be determined, in the case of a nonresident not a citizen of the United States, by deducting from the value of that part of his gross estate (determined as provided in section 811), which at the time of his death is situated in the United States.—

* * *

(26 U. S. C. 861.)

SEC. 862. PROPERTY WITHIN THE UNITED STATES.

For the purpose of this subchapter—

* * *

(b) *Revocable Transfers and Transfers in Contemplation of Death.*—Any property of which the decedent has made a transfer, by

trust or otherwise, within the meaning of section 811(c) or (d), shall be deemed to be situated in the United States, if so situated either at the time of the transfer, or at the time of the decedent's death.

(26 U. S. C. 862.)

SEC. 863. PROPERTY WITHOUT THE UNITED STATES.

The following items shall not, for the purpose of this subchapter, be deemed property within the United States:

* * *

(b) *Bank Deposits.*—Any moneys deposited with any person carrying on the banking business, by or for a nonresident not a citizen of the United States who was not engaged in business in the United States at the time of his death.

(26 U. S. C. 863.)

Treasury Regulations 105, promulgated under the Internal Revenue Code:

SEC. 81.50. *Situs of property.*—Real estate, tangible personal property, and the written evidence of intangible personal property which is treated as being the property itself are within the United States if physically situated therein. For example, a bond for the payment of money is not within the United States unless physically situated therein. Stock of a domestic corporation, however, constitutes property within the United States, irrespec-

tive of where the certificates thereof are physically located.

Intangible personal property the written evidence of which is not treated as being the property itself constitutes property within the United States if consisting of a property right issuing from or enforceable against a resident of the United States or a domestic corporation (public or private), if not subject to the exceptions prescribed in section 863 (a) and (b). Under the provisions of that section the amount receivable as insurance upon the life of a decedent who was a nonresident not a citizen, and moneys deposited by or for such a decedent, who was not engaged in business in the United States at the time of his death, with any person carrying on the banking business, shall not be deemed property within the United States.

Property of which the decedent has made a transfer taxable under the provisions of section 81.15 is deemed to be situated in the United States if so situated either at the time of the transfer or at the time of the decedent's death.

* * *

SEC. 81.51—*Net estate.*—The Internal Revenue Code imposes the tax upon the transfer of only the portion of the estate of a nonresident not a citizen that was situated in the United States. In determining the net estate, the deductions specifically authorized for this class of cases may be taken from the portion of the gross estate situated in the United States.

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